How The Supreme Court Failed on The First Amendment

Exactly What The Founding Fathers Hoped The Press Would Do

Far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.—*Black (with Douglas concurring in the case of the Pentagon Papers).*

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The Crisis Coming For A Free Press

In the Pentagon Papers, the government had a poor case on the facts. It had an even poorer case on the law. It is a pity that the upshot was not the kind of historic defense of a free press that the weak pleadings and the grave circumstances called for. *The press did its duty but the Supreme Court did not.* Its splintered opinions left a bigger loophole than before for prior restraint—something English law abandoned in 1695 and the American press has never experienced. In addition five of the nine Justices encouraged the government to believe that they would give it wide latitude if it sought to punish editors for publishing official secrets *after* they did so instead of trying to enjoin them in advance. Two Justices indeed spent most of their opinions helpfully spelling out possibilities for successful criminal prosecution. It will be a miracle if this Administration, which is almost paranoid in its attitude toward the media, is not encouraged to include editors and reporters among the "all those who have violated Federal criminal laws" the Attorney General now says he will prosecute.

Fresh Need For Secrecy

The coming attempt to prosecute for violation of the government's classification orders involves nothing less than the future of representative government. For if the government can continue to abuse its secrecy stamps to keep the press, the Congress and the people from knowing what it is really doing —then the basic decisions in our country are in the hands of a small army of faceless bureaucrats, mostly military. The struggle comes at a climactic moment when Hanoi's new peace offer and public weariness with the war make it all the more necessary for the bureaucratic machine to prevent new leaks by intimidating its own mavericks and the press. Duplicity is more requisite then ever when the other side makes it necessary plainly to choose between release of the prisoners or continued pursuit of a military-political victory in South Vietnam. From every indication, Nixon's answer, however veiled, will be to pursue the war. This will intensify his conflict with the media.

First, as to the facts: Trial of the government's action against the *New York Times* and the *Washington Post* proceeded on the assumption that two documents in their entirety were in the hands of these newspapers—a 47-volume Pentagon history of our involvement in Vietnam from 1945 to 1968, and a "Command and Control" report on the Tonkin Gulf incidents of 1964. The government was invited to "pinpoint" for the trial judges, the two Courts of Appeal and the Supreme Court precisely which portions of these documents were so sensitive that their publication warranted an order forbidding the papers to publish them. To give the government greater leeway, it was allowed to present much of its evidence in secret. This was the first secret proceeding of its kind ever held in the U.S. courts, itself a disturbing precedent for the future. Yet of the 27 Federal judges who passed on the government's pleadings not a single one thought the evidence impressive enough to warrant a preliminary injunction. The government was able to obtain nothing more than temporary restraining orders pending trial and appeal, and those who dissented on the appeals courts and the Supreme Court did no more than argue for a remand for further hearing. This is the best measure of just how dubious the government's system of classification looked even to sympathetic judges in secret hearings.

Some of the dissenting judges thought the case was disposed of too hastily, and that the government should have had more time. But the government had had ample time to review the two documents involved. The Senate Foreign Relations Committee has been negotiating with the Pentagon for the Com-

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Freedom Of Information Act: A Joke

Q. What protection does the public have under the current situation against any administration using national security laws to shield its own mistakes and politically embarrassing decisions?

A. Well, in addition to the Court's decision—and the Congressional power, which is considerable—you also have the Freedom of Information statute. . . .

—Secretary of State Rogers at the press conference July 1 in which he invited newsmen to clear material in advance with the government.

But Rogers as a lawyer knows that the Freedom of Information Act contains a loophole as big as a barn door. Only a few days before he spoke the government seized on this loophole to argue before the Supreme Court in the case of the Pentagon Papers that the Freedom of Information Act actually authorizes secrecy! "Congress has recognized," its brief said, "the authority of the President to protect the secrecy of information relating to foreign relations and national defense. The first exemption to the Freedom of Information Act, which generally provides for making public information in the hands of the government, specifically exempts from the statute's disclosure provisions 'matters that are—(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.'" So how can the Act protect the public?

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Raising An Alarm About Documents Never Leaked to the Press

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mand and Control document since early in 1968 and the so-called Pentagon Papers since November, 1969. At least half a dozen letters have passed between Chairman Fulbright and Secretary Laird about these documents, and the Pentagon classification officer who was assigned to review them as a result of Fulbright's repeated requests testified during the trial. The government had plenty of time to decide what in the documents was really sensitive. Apparently the Judges didn't think very much was. But only as this is written the Senate Foreign Relations Committee has finally received copies of both. It took a tidal wave of a leak to pry them loose but they arrived still stamped "Top Secret"! The truth about the Tonkin Gulf incidents may be buried in the Command and Control report but the *New York Times* completed its series without disclosing what was in this document and the Senate Foreign Relations Committee is still forbidden by the "Top Secret" stamp from discussing the contents publicly. It will be seven years next month since the Tonkin Gulf incidents occurred and we still don't know the full truth about them, though they were used to get a blank check for war from Congress.

The two dissenting judges who were most impressed with the government's case were Judge Wilkey on the Court of Appeals for the District of Columbia and Mr. Justice Blackmun on the Supreme Court. They felt that *if* the newspapers, had, and *if* they published, certain documents dealing with diplomatic negotiations this would do great harm. But Dr. Ellsberg at his press conference in Cambridge June 28 said he withheld "several" of the 47-volume Pentagon Papers from the newspapers because they involved secret negotiations with Hanoi, Moscow and other foreign capitals. On NBC's Today show July 2 he said he gave the full set to the Senate Foreign Relations Committee but did not retain any copy of these diplomatic volumes "since I had no intention of giving them to the newspapers at any time." In oral argument before the Supreme Court, the Solicitor General said he had "pinpointed" 10 sensitive items in his secret brief and that one of them was made up of four volumes "all dealing with one specific subject." Are these the volumes Dr. Ellsberg withheld?

Like, Maybe, In The Year 2,000?

Philadelphia, (UPI) — Attorney General John N. Mitchell said today the public has "an absolute right" —but not at this time—to the Pentagon's study published recently in the New York Times and the Washington Post.

—Washington Post, June 22.

Just A Pentagon "Suggestion" For Starving Out A Million People

At least one plan was suggested to immobilize the North the secret documents disclosed. John McNaughton, then an Assistant Secretary of Defense, said North Vietnam's intricate lock and dam system was particularly sensitive. Destroying it, flooding rice fields and raising the specter of national famine, if correctly handled, could "offer promise," McNaughton suggested. The documents quoted his memo as saying: "It should be studied. Such destruction does not kill or drown people. By shallow-flooding the rice, it leads after time to widespread starvation of more than a million (?) unless food is provided." This, the memo added, the U.S. could offer to do "at the conference table."

—AP in Baltimore Sun *July 3 based on the documents released by Senator Gravel. The memo seems to have been early in 1965. In our issue of July 12, 1965,* "Will We Do In Vietnam What The Nazis Did in Holland?" *we warned against just such bombings and noted that destruction of the Dutch dikes was one of the war crimes for which the Nazi occupation chief was ordered hung at Nuremberg. The article may be found reprinted in my book* "In A Time of Torment" *(Random House and Vintage, 1967).*

The newspapers provided the court with inventories of the documents in their possession. The Solicitor General told the Supreme Court that the government's experts had difficulty in matching this inventory against the 47-volume Pentagon Papers. There may have been difficulty in matching individual items but it is hard to understand why they could not match up an "item" as large as four related volumes. A week before the oral argument, the *Christian Science Monitor* (June 19) carried a story from Washington saying that Pentagon experts, after they compared the published reports in the *Times* "with the still guarded and highly classified originals," decided that the disclosures were "something less than catastrophic." They informed higher officials "that some potentially damaging material, *particularly in terms of America's relations with other nations* [our italics] had been omitted." This sounds as if they spotted the material Ellsberg withheld. It is a pity the secret record cannot be opened up to resolve this mystery. The government's most impressive cause for alarm would have been eliminated by the admission that these volumes had never reached the newspapers at all.

All this may explain the curious vagueness and equanimity displayed by Deputy Under Secretary of State Macomber on the *Today* show July 5, the day the *New York Times* series ended. He admitted that Dr. Ellsberg had withheld some

Black (With Douglas) Voice The Orthodox And Traditional American Doctrine

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it would bare the secrets of government and inform the people. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

The Government argues in its brief that in spite of the First Amendment, "the authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the Constitutional power of the President over conduct of foreign affairs and his authority as Commander-in-Chief."

The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure."

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

—Black with Douglas concurring in the press cases. (abr.)

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20 Million Classified Documents—Only 1/2 of 1 Percent Really Sensitive

sensitive documents and that the newspapers themselves had withheld others. When asked whether the *New York Times* or the *Washington Post* had published items "the government has pointed to as particularly sensitive," he replied, "I don't think the *Washington Post* has. I think the *New York Times* may have. I don't want to say it has. I'm not sure." So this is the molehill to which the government's mountainous original charges dwindled.

Nullifying The Intent Of The Framers

The government made an even poorer showing on the law. Solicitor General Griswold's argument was downright trivial and the few precedents he cited were irrelevant and quoted out of context. Unfortunately the newspaper lawyers were no better. Never was a great case argued so feebly. No one took the First Amendment as his client. The defense lawyers argued the case as narrowly as possible in order to get their newspaper clients off the hook. Prof. Alexander Bickel, whom the *New York Times* retained specially for the occasion, is no firm defender of the First Amendment; he holds the "balancing" view Frankfurter among others propounded. This holds, as Griswold flatly said during argument, that where the First Amendment says "Congress shall make no law . . . abridging freedom of the press," it does not mean what the plain words say but only that freedom of the press must be "balanced" against other public considerations. Bickel agrees with Griswold. This nullifies the intention of the Framers.

The crisis for which the bar and the press must mobilize lies in the fact that never before have the courts had to confront the freedom of the press issue in this form. The publication of secret government papers is hardly new. A patriot newspaper in Boston, thanks to a leak from Benjamin Franklin, published the Royal Governor's correspondence on the eve of the Revolution. The furor over the Sedition Act began in 1798 when John Franklin Bache (Benjamin's grandson) published secret diplomatic documents to attack the covert Federalist war against France. But this was before the days of "classification" and leaks of this kind were prosecuted as seditious libels intended to bring the government into disrepute. What we face now are the first prosecutions of the press for upsetting the government's system of classification. The freedom of the press issue is thereby entangled with the question of national security.

A government cannot be denied the right to some secrets, especially in wartime. But what makes this case so crucial is that Dr. Ellsberg's leak and its publication in the press represented the first open revolt against a system of secrecy which has reached cancerous proportions and threatens unless checked to destroy free government itself. The amount of information now stamped secret and withheld from the press and Congress is staggering. The *Washington Star* estimates (July 8) that Pentagon Xerox machines produce about 100 million documents a year. A recently retired Air Force security officer told a House Government Information subcommittee June 24, "I would guess that there are at least 20 million classified documents, including reproduced copies, in existence" and added, "I sincerely believe that less than one-half of one percent of the different documents actually contain information qualifying even for the lowest defense classification."

The Pentagon Papers showed that the government has been carrying on secret warfare in Indochina since 1954. They

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Even If The Documents Are Stolen

The mere fact that a newspaper man obtained information in a clandestine fashion or in a surreptitious manner or because somebody unguardedly and unwittingly reveals confidential information, or even through a breach of trust on the part of a trusted employee, does not give rise to an action for an injunction. The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral. It would be a far reaching limitation on the freedom of the press if courts were endowed with power to review the manner in which the press obtains its information and could restrain the publication of news that is obtained in a way that the court does not approve. If such were the law, we would not have a free press; we would have a controlled press. Such, however, is not the law.

—District Judge Alexander Holtzoff in Liberty Lobby, Inc. *v.* [Drew] Pearson, *261 F. Supp. 726, 728-9 (D.D.C. 1966)*, aff'd. *390 F. 2nd 49 (D.C. Cir. 1968). Quoted in the Washington Post brief in the Supreme Court. The ruling is given added force because it came from one of the most right-wing members of the District bench, a protege and former counsel of J. Edgar Hoover. And because the Court of Appeals decision upholding him was written by Warren Burger, now Chief Justice of the Supreme Court!*

27 Members of Congress Spell Out the Danger Now Threatening Freedom of the Press

In cases at the bar, for the first time in the history of this country, various formulations have been proposed for an exception applying broadly to national security matters. Judge Gurfein would allow an exception for "information or documents absolutely vital to current national security." The Court of Appeals for the Second Circuit approved censorship of items which "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

The Government's proposal would permit an injunction against the publication of any classified material unless the publisher could show that the classification was arbitrary and capricious. If this court sanctions such a rule the press will be at the mercy of the Department of Justice. The Government will be in a position to leak any classified information that serves its own purposes and shut off countervailing information.

The formulations of Judge Gurfein and the Court of Appeals for the Second Circuit, although most stringent on their face, would be almost equally destructive of a free press in America. We do not make this statement lightly. Under any of these formulations the Executive can hold up publication simply by alleging that a serious breach of national security would occur. The court would then issue a restraining order, allow the Government to present its case, and then decide whether there was sufficient danger to warrant issuance of an injunction against publication. This process in itself is a system of prior restraint.

Moreover, most of the proceeding—certainly the critical parts—would take place in camera. Both the *New York Times* and the *Washington Post* cases followed this procedure, on the ground that otherwise the injury to national security would occur in the course of the hearing. Only the defendants and their counsel were permitted to attend the in camera session. More than that, no one was allowed to be present unless he was first given security clearance by the Government. Hence the plaintiff in the case was able to dictate what individual defendants, and what counsel, were entitled to participate in determination of the issue. Such procedure can hardly be recommended in a democratic society.

—Brief of twenty-seven members of Congress, as amici curiae, filed by Rep. Bob Eckhardt (D-Tex) and Thomas I. Emerson, Yale Law School, in the Supreme Court. (abr.)

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Freedom Is Worth The Price of A Few Secrets Leaked

(Continued From Page Three)

disclosed for the first time the full dimensions of the arrogance, duplicity and inhumanity with which successive Administrations got us into this horrible mess which is tearing the country apart and demoralizing the armed forces themselves. It was the height of Nixon era banality for Chief Justice Burger to say that a newspaper editor, handed such documents, should, like a taxi driver who finds stolen goods in his cab, turn them over to the police! To reduce such historic revelations in the midst of an agonized public debate over the war to the dimensions of a simple case of larceny and receiving stolen goods is utterly to miss the function of a free press in a free society.

Representative government is menaced today by a cloud of secrecy. The Daniel Ellsbergs and Neil Sheehans are too few; a Senator like Gravel willing to challenge the classification system in which Congress has acquiesced for so many years, is unique. We need more such rebels, not fewer, if free government is to survive.

The Philosophy Of Risk

In the fight against government secrecy we need to apply in a fresh form the philosophy of risk which laid the foundations for real freedom of the press in the earlier struggle against the law of seditious libel. It is often forgotten that after prior restraint or censorship ended almost three centuries ago, the press was still shackled by the common law of seditious libel. Editors went to jail for bringing government into disrepute; the rule was that the greater the truth of their publications the greater the offense; royal governors decided the law and made conviction by the jury almost a foregone conclusion. The reformers sought to protect the press by making the jury the judge of the law as well as the facts, and to make truth a defense. The Sedition Act of 1798, so notorious in our history, actually embodied these reforms, though its purpose was repressive. Like Fox's historic Libel Act six years earlier in England, it made the jury the judge of the law as well as the facts; in addition the Sedition Act made truth a defense, something English law did not achieve until 1843.

But these long sought reforms proved illusory. In the heat of partisan passion, only one jury failed to convict in a Sedition Act case and "truth" proved difficult to determine. It became clear that freedom of the press could only be secure if the press were allowed to propagate error. Otherwise censorship was only replaced by prosecution after publication. It was in the battle against the Sedition Act that the Jeffersonians for the first time* hammered out the libertarian doctrines which have made ours the freest press in the world. The philosophy to which we are indebted runs in a great line from Madison, the Father of the Constitution, to Brandeis, and from them to Black and Douglas. It says that freedom is impossible without risk, and that the risks of free discussion are wiser than the risks of repression. This is what the best young people yearn for under Communist rule and this is what we are in danger of forgetting in the Nixon era.

We must apply the philosophy of risk to the new circumstances. Talk of reforming the classification system will soon evaporate. Successful prosecutions would only nail it down. The path of least resistance is that which Nixon has already charted: to cut down the number of persons with access to secret documents and to tighten up on security. It would in any case take a small army many years to review the classification of all our secret documents. The only hope lies in jury acquittals in the coming prosecutions, and in arguing that the only possible check on the abuses of overclassification and secrecy is to allow unpunished the leak and publication of documents like the Pentagon Papers. Congress by twice refusing to enact an Official Secrets Act in wartime has shown itself of a similar mind. Men of courage are all too rare; the circumstances which bring establishment papers to print such documents are even rarer. This is the only safety valve we have if the people's right to know is not entirely to disappear. *July 9*

*One may find this ably developed in Leonard W. Levy's book, Freedom of Speech and Press in Early American History.

Agnew Must Envy Thieu's Way With The Media

The radio and television networks here, which are controlled by the Government, have virtually been directed to ignore all mention of the contents of the Pentagon papers. In response to questions today, Vu Khanh, an official of the Information Ministry, said the radio and television networks here "agreed with the idea that the substance of the Pentagon papers as reported by the New York Times and other American papers do not have news value for the local public."

—Alvin Shuster, from Saigon, N.Y. Times, *July 2.*

Off On Vacation — Next Issue Goes To Press Aug. 31

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